No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

266-695—67——1

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The Solicitor General, on behalf of the United States prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 20, 1967.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (App., *infra*, pp. 26–34) is reported at 247 F. Supp. 878. The opinion of the court of appeals (App., *infra*, pp. 13–24) is reported at 372 F. 2d 372.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 25) was entered on January 20, 1967. By order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to and including

June 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the False Claims Act, 31 U.S.C. 231, extends to a false and fraudulent application for a federal loan which results in the disbursement of federal funds to which the applicant is not entitled.

STATUTE INVOLVED

The False Claims Act, 31 U.S.C. 231, provides in pertinent part:

> Any person not in the military or naval forces of the United States * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

This action was instituted by the United States against the respondent Neifert-White Company to recover statutory forfeitures under the False Claims Act, 31 U.S.C. 231. The facts are as follows.[1]

In order "to encourage the storage of grain on farms, where it can be stored at the lowest cost * * *", the Commodity Credit Corporation (CCC) was authorized by the Commodity Credit Corporation Charter Act of 1948 to "make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage * * *". 15 U.S.C. 714b(h).[2] Acting under its general authority to adopt "regulalations governing the manner in which * * * the powers vested in it may be exercised" (15 U.S.C. 714 b(d)), the CCC has provided for the granting of farm storage facility loans in amounts not exceeding 80 per cent of the actual purchase price of the storage bins. 23 F.R. 9687: To facilitate the enforcement of this limitation, the regulations require that the grain grower's loan application be accompanied by an invoice reflecting the actual cost of the storage bins and the amount of the down payment made by him (*ibid.*).

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[1] Since the complaint was dismissed for the failure to state a claim upon which relief could be granted, for present purposes the facts are undisputed.

[2] The Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture * * *" (15 U.S.C. 714) and within the meaning of the False Claims Act, see *Rainwater* v. *United States*, 356 U.S. 590, 591–592.

Respondent Neifert-White is a dealer in grain storage bins. In connection with sales of bins in 1959 to twelve grain farmers, an officer of respondent prepared invoices in which the purchase price of the bins was deliberately overstated (R. 2–15).[3] These false invoices were prepared for the purpose of fraudulently inducing the CCC to extend loans to respondent's customers in amounts in excess of the 80 per cent limitation (R. 2–15). They were submitted to the CCC together with the loan applications and the agency relied upon them in determining the amount of the loans to be extended (R. 2–15).

This suit under the False Claims Act, 31 U.S.C. 231, *supra*, p. 2, was thereafter instituted by the United States to recover from the respondent the forfeitures authorized by that statute with respect to those who, "for the purpose of * * * aiding to obtain the payment or approval" of a "false, fictitious, or fraudulent" claim against the United States, knowingly cause "to be made or used, any false bill, receipt, voucher * * *." On respondent's motion, the action was dismissed by the district court on the ground that an application for a CCC loan is not a "claim" within the meaning of the Act (App., *infra*, pp. 29–33). The court of appeals affirmed. Relying principally upon language in *United States* v. *Cohn*, 270 U.S. 339, 345–346, it concluded that the loan applications did not constitute "claims" because they "were not based upon assertions of legal right against the Government" (App., *infra*, p. 24).

[3] "R. —" refers to the typewritten record in the court of appeals which has been lodged with the Clerk.

REASONS FOR GRANTING THE WRIT

Reading the False Claims Act as embracing only claims "based upon assertions of legal right" against the government (App., *infra*, p. 24), the court below withdrew the protection of that Act from the CCC's extensive loan programs—protection that had been accorded them since at least this Court's decisions in *Rainwater* v. *United States*, 356 U.S. 590, and *United States* v. *Cato and Toepleman*, decided *sub nom. United States* v. *McNinch*, 356 U.S. 595. The decision of the court below conflicts with those of other courts of appeals; if permitted to stand it will have a substantial adverse impact upon the administration of numerous federal loan and subsidy programs involving the annual disbursement of billions of dollars from the public Treasury.

1. As the court below implicitly acknowledged, its requirement that the "claim" involve an "assertion of legal right" has not been imposed by any other court as a basis for defeating False Claims Act liability in circumstances akin to those here presented. To the contrary, the Act has been consistently held applicable to false and fraudulent endeavors to obtain the disbursement of federal funds or the transfer of public property without regard to whether a legally enforceable right to the funds or property had been asserted.

Thus, in *United States* v. *Rainwater*, 244 F. 2d 27 (C.A. 8), affirmed, 356 U.S. 590, imposition of statutory penalties under the Act was upheld as to those who had made false representations to the CCC for the purpose of obtaining loans on cotton crops. See

also, *United States* v. *Cato and Toepleman, supra,* both of which involved similar CCC loan applications: Although the single question in this Court was whether a claim filed with the CCC was a claim "against the Government of the United States" within the meaning of the Act, the resolution of that issue, as well as the ultimate imposition of liability, presupposed that the loan applications were "claims" under the Act.

Similarly, *Sell* v. *United States,* 336 F. 2d 467 (C.A. 10), held the Act applicable to a fraudulent application for assistance (in the form of surplus grains) under an emergency grain-feed program administered by the CCC. The court expressly concluded that the application "was a 'claim' as contemplated by the Act." 336 F. 2d at 474. See also, *Toepleman* v. *United States,* 263 F. 2d 697 (C.A. 4), certiorari denied, 359 U.S. 989; *United States* v. *Cherokee Implement Co.,* 216 F. Supp. 374 (N.D. Iowa) (application for CCC loan to finance purchase of farm equipment).

Although conceding that, in *Rainwater, Toepleman* and *Sell,* "the government was permitted to recover [even though] it is doubtful that the disbursement of federal funds was made pursuant to an assertion of right," the court below nevertheless found those decisions to be unpersuasive because in none was the "assertion of right" test specifically rejected (App., *infra,* pp. 20–21). At the same time, however, the court was unable to point to any holdings of other courts specifically adopting that test.

2. As previously noted, the court of appeals based its interpretation almost exclusively upon this Court's

statement in *United States* v. *Cohn*, 270 U.S. 339, 345–346, that "[t]he provision relating to the payment or approval of 'a claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." Taken in its context, that statement does not require the conclusion that a false application seeking the disbursement of public monies is not subject to the False Claims Act unless founded on an assertion of an enforceable right. Rather, it was addressed to entirely discrete circumstances.

In *Cohn*, by the use of false documents, the defendant had improperly obtained the release of merchandise being held by the customs authorities. No customs duties were owed on the importation of the merchandise, however, and the United States had no claim of ownership. It was to these factors that the Court's statement was addressed, for, as the Court pointed out (270 U.S. at 346), "obviously" the statutory provision relating to "claims" does not include

> * * * an application for the entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession. This is not the assertion of a "claim upon or against" the Government, within the meaning of the statute; and the delivery of the posses-

sion is not the "approval" of such a claim.[4]

The court of appeals also noted (App., *infra*, p. 17) that the *Cohn* dictum had been quoted as having "relevancy" in this Court's opinion in *United States* v. *McNinch*, 356 U.S. 595, 600, n. 10. The single issue in that case, however, was whether an application for credit insurance not calling for the immediate disbursement of federal funds was a "claim." In holding that it was not, the Court stressed (356 U.S. at 598–599):

> In agreeing to insure a home improvement loan the FHA *disburses no funds nor does it otherwise suffer immediate financial detriment.* It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any. [Emphasis supplied.][5]

Here, unlike *McNinch*, the government was called upon immediately to disburse funds on the basis of the false applications.

3. There is no sound reason why the application of the False Claims Act to a fraudulent application

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[4] See also, *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545, where the Court noted:

> The situation here is in no sense like that discussed in *United States* v. *Cohn*, 270 U.S. 399, 345–347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money * * * of the government's," while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

[5] It is significant that the Court expressly reserved decision "as to whether a lending institution's demand for reimburse-

for a federal loan should depend upon whether Congress made the granting of the loan mandatory or permissive. The primary purpose underlying the enactment of the False Claims Act was to stop the "plunder of the public treasury." *United States* v. *McNinch, supra,* 356 U.S. at 599.[6] Where, as here, the United States has been induced by fraud to disburse its funds, the impact on the public purse is no less because the false assertion was one of eligibility to receive, rather than legal entitlement to, the funds sought.

The consequences of the distinction drawn by the court of appeals are brought into sharp focus when it is applied to a farmer who falsely certifies that he is eligible for both (1) federal price support payments on his crop, and (2) a loan to finance the purchase of storage facilities for that crop. The court below agrees (App., *infra,* p. 19) that the false representation of eligibility for price support payments

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ment on a defaulted loan originally procured by a fraudulent application would be a 'claim' covered by the False Claims Act." 356 U.S. at 599, n. 6. Subsequently, in *United States* v. *Veneziale*, 268 F. 2d 504, the Third Circuit answered that question in the affirmative.

[6] The court below emphasized (App., *infra*, p. 23) this Court's admonition in *McNinch* that, because the civil provisions of the Act incorporates the Act's criminal provision, the rule of strict construction of criminal statutes should normally be followed. See 356 U.S. at 598. We think it clear, however, that because no novel reading or application of the Act is sought (see cases discussed, *supra*, pp. 5–6), the rule of construction followed in a companion case to *McNinch*—involving, as here, an application for a CCC loan—should govern, *i.e.*, that "even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress.'" *Rainwater* v. *United States*, *supra*, 356 U.S. at 593.

would constitute a violation of the False Claims Act (see *United States* v. *Brown*, 274 F. 2d 107 (C.A. 4)) because it involves an "assertion of right." Since, however, the grant of a storage-facility loan is discretionary, the second false representation would not be similarly actionable. This disparity would result although the vice in both cases is identical: the use of false pretenses to obtain federal funds. It needs no argument that, if the government were to become aware of the deceit in sufficient time, no federal funds would be disbursed on a fraudulent application regardless of whether that application were labeled as "of right" or, instead, were addressed to the discretionary authority of the particular agency.

4. The question is a recurring one. We are advised by the Department of Agriculture that, during the fiscal year ending June 30, 1966, the CCC made almost 4½ million loans on price support commodities alone, in the total amount of almost two billion dollars. In addition, it extended more than nine thousand storage-facilities and equipment loans in a total amount of approximately 13½ million dollars. Substantial numbers of loans, involving in the aggregate enormous sums of federal money, are made under other lending programs administered by the Department of Agriculture and other governmental agencies.

Moreover, while entitlement to some grants-in-aid and other forms of subsidy may be asserted "as a matter of right," the great majority of such disbursements are made on a discretionary basis (*e.g.*, grants in connection with the poverty program and the scien-

tific and educational programs administered by the Department of Health, Education and Welfare). Thus, if the interpretation given the False Claims Act by the court below is allowed to stand, additional billions of dollars in annual federal expenditures would be deprived of this important—and highly effective—statutory protection.[7]

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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[7] To be sure, the decision below does not leave the government completely remediless. In other cases there may be an action at common law (see, *e.g.*, *United States* v. *Silliman*, 167 F. 2d 607 (C.A. 3), certiorari denied, 335 U.S. 825); and an offender may of course be prosecuted criminally (see 18 U.S.C. 1001; 15 U.S.C. 714m). But no other civil remedy is nearly as effective or comprehensive as that provided by the False Claims Act. And if that Act is (as we think) applicable, the penalties of the criminal law may be reserved for circumstances which particularly call for such sanctions.